to pay. It is an engagement to pay if the bank does not. *Cf. Byrd Printing Co.* v. *Whitaker Paper Co.* (1911) 135 Ga. 865, 70 S. E. 798; N. I. L. § 61. If there is a consideration, the engagement is of course binding. And there is always a rebuttable presumption of consideration. *Louisville, Evansville & St. Louis Ry.* v. *Caldwell* (1884) 98 Ind. 245; see *Averett's Adm'r* v. *Booker* (1859) 56 Va. *163, *164 *et seq.; cf.* N. I. L. § 24; *contra, Kinsella* v. *Lockwood* (1913) 79 Misc. 619, 140 N. Y. Supp. 513. So it would seem that the better view is the alternative rejected by the court in the instant case; namely, that the telegram was only an instruction to the bank as agent, to pay. In the instant case the distinction was immaterial, but in another it may be decisive.

SALES—ACCEPTANCE OF DEFECTIVE GOODS—BREACH OF WARRANTY AS DEFENCE.—The plaintiff contracted to sell the defendant forty cars of tomatoes, of a certain grade, and free from certain defects, to be shipped at the rate of one a day. Thirty cars were shipped. The last nine carloads were defective, and the vendee gave notice to the plaintiff of the defects but accepted them. The vendor brings this action for the last nine cars on two counts, one for the contract price and the second a common count for the value of the goods. *Held, inter alia,* the vendee has a defence to an action on the contract. The seller can only recover on the *quantum valebant* count. *Standard Growers' Exchange* v. *Howard et al.* (Fla. 1921) 89 So. 345.

The decision in the instant case can be supported only upon the theory that delivery of inferior goods amounts to a failure of consideration. *Cf. Ruiz* v. *Norton* (1854) 4 Cal. 355; *Andrews* v. *Eastman et al.* (1868) 41 Vt. 134. A vendee may reject goods which are not as specified. *Flour Mills Co.* v. *Moll* (1920) 106 Kan. 827, 189 Pac. 940. But one who retains defective goods is liable for the purchase price. *Lieberman* v. *Beck & Cohaim, Inc.* (1920) 179 N. Y. Supp. 472. Such acceptance, however, does not waive the right of the vendee to sue or counterclaim for the breach of warranty. *Taylor* v. *Cole* (1873) 111 Mass. 363; *English et al.* v. *Spokane Commission Co.* (1891) 48 Fed. 196. Where no notice of the defect is given to the vendor within a reasonable time after the vendee learns of it, the vendee loses his right to take advantage of the breach. *Wright* v. *Dubbolde et al.* (1919) 42 S. Dak. 12, 172 N. W. 500. Some courts hold that such notice is not necessary. See *English et al.* v. *Spokane Commission Co., supra,* 198. But in an action for the price, it is no defence for the vendee who has retained the goods, to show that they were defective. *Chambers* v. *Lancaster* (1899) 160 N. Y. 342, 54 N. E. 707. If the goods are wholly valueless, it is a good defence, because then there has been a total failure of consideration. *Imperial Gas Engine Co.* v. *Auteri* (1919) 40 Cal. App. 419, 180 Pac. 946. The Uniform Sales Act § 69 limits the remedy of the buyer who has accepted defective goods to a counterclaim or an action for the breach of warranty. *Lieberman* v. *Beck & Cohaim, Inc., supra, (semble).* The instant case seems an unsound departure. By knowingly retaining the defective goods, the vendee affirms the contract, and hence the defect is no defence to an action on the contract. The vendee may counterclaim or sue for the breach of warranty, and thus be compensated for his actual damage and amply protected.

SALES—CONDITIONAL SALE DISTINGUISHED FROM CHATTEL MORTGAGE.—The plaintiff sold cattle to B under a conditional sale note reserving title until the note was paid, and the right to re-take and sell at any time, the vendee being liable for any deficiency. B sold the cattle to the defendant who claimed that the above instrument was a chattel mortgage, and, not being registered, was void as against him. *Held,* one judge dissenting, the transaction was a conditional sale. *Inter alia,* if the

risk of loss was on the maker of the deed, it is a mortgage; if it is on the payee, it is a conditional sale. *Schneider* v. *Daniel* (Ind. 1921) 131 N. E. 816.

The primary distinction between a chattel mortgage and a conditional sale is that technically the former is a reservation of a lien to secure an indebtedness. See *Elliott* v. *Conner* (1912) 63 Florida 408, 412, 58 So. 241. The latter on the other hand is an agreement to transfer title upon the performance of a condition by the vendee, generally the payment of the purchase price. *Southern Hardware & Supply Co.* v. *Clark* (C. C. A. 1912) 201 Fed. 1. The character of the transaction depends on which of these results the parties intend. *In re Craig Lumber Co.* (C. C. A. 1921) 269 Fed. 755. There are several rules for ascertaining this intent. For instance, a grossly inadequate consideration is an indication of a chattel mortgage. See *Elliott* v. *Conner, supra,* 412. The absence of a prior debt indicates a conditional sale. *Stollenwerck* v. *Marks & Gayle* (1914) 188 Ala. 587, 65 So. 1024. The intent of the parties is to be taken from the entire transaction. *Keane* v. *Kibble* (1915) 28 Idaho 274, 154 Pac. 972. This intention is not determined by what the parties label the transaction. *Walker* v. *Wilmore* (Tex. 1919) 212 S. W. 655. The court in the instant case applied these rules correctly, but added another rule; namely, that if the risk of loss is on the transferor it is a conditional sale. This is unsound, as in the instant jurisdiction, as well as in others, the risk of loss in a conditional sale is on the vendee. See *Quality Clothes Shop* v. *Keeney* (1915) 57 Ind. App. 500, 506, 106 N. E. 541; (1907) 7 COLUMBIA LAW REV. 141; Uniform Conditional Sales Act § 27. This error, however, did not lead the court to an unsound result.

SALES—RESCISSION FOR VARIANCE FROM DESCRIPTION.—The plaintiff seller contracted to ship tins of canned fruit, packed thirty tins to a case. The defendant buyer rejected the shipment because about half were packed twenty-four tins to a case. A referee found that the market value was unaffected by the packing. In an action on the contract, *held,* for the defendant. *Moore & Co., Ltd.* v. *Landauer & Co.* (1921) 125 L. T. R. (N. S.) 372.

At common law, if goods sold by description varied from it, they might be rejected. *Nichol* v. *Godts* (1854) 10 Exch. 191. But a variance so slight as to be negligible was disregarded by the courts. See *Naftzger* v. *Henneman* (1919) 94 Ore. 109, 118, 185 Pac. 233. If it was claimed that the goods were not of the type described, the question was whether they were salable as goods of that type. *Wieler* v. *Schilizzi* (1856) 17 C. B. 619; *Gossler* v. *Eagle Sugar Refining Co.* (1869) 103 Mass. 331. If the method of packing or the time of shipment was the issue, the courts in some cases considered both the effect on the value of the goods and the terms of the contract. *Makin* v. *London Rice Mill Co.* (1869) 20 L. T. R. (N. S.) 705; see *Alexander* v. *Vanderzee* (1872) L. R. 7 C. P. 530, 533. Subsequently, a variance entitled the buyer to rescind regardless of the pecuniary effect of the variance. *Bowes* v. *Shand* (1877) 36 L. T. R. (N. S.) 857. This was not changed by the Sale of Goods Act. (1893) 56 & 57 Vict., c. 71, §§ 13, 30(3); see *Manbre Saccharine Co., Ltd.* v. *Corn Products Co., Ltd.* (1918) 120 L. T. R. (N. S.) 113, 116. The instant case, therefore, followed the authorities. It would probably be followed in the United States. *Cf. Filley* v. *Pope* (1885) 115 U. S. 213, 6 Sup. Ct. 19; Uniform Sales Act § 44 (3). In view of statutory regulation, the decision is sound. It has the merit of enforcing the contract as made; it is certain and of easy application; the seller is not oppressed since he need not warrant the impossible. But in analogous cases courts are tending to permit recovery upon substantial performance of an express condition precedent, allowing a counterclaim for the actual damages suffered. *Cf. Jacob & Youngs* v. *Kent* (1921) 230 N. Y. 239, 129 N. E. 889; *Dakin & Co.* v. *Lee* [1916] 1 K. B. 566; see (1921) 21 COLUMBIA LAW REV. 582.